

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the Local Competition
Provisions in the Telecommunications Act
of 1996

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CC Docket No. 96-98 /

BELLSOUTH'S COMMENTS

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BELLSOUTH'S COMMENTS

Pursuant to the Commission's *Fourth FNPRM*,¹ its *Supplemental Order Clarification*,² and *Public Notice*,³ BellSouth Corporation ("BellSouth") submits these comments on behalf of itself and BellSouth Telecommunications, Inc.

I. INTRODUCTION AND SUMMARY

The Commission seeks comments in this proceeding to assess the "legal and policy ramifications" of imposing unbundled network element ("UNE") regulation on special access services. Before and after the *UNE Remand Order*, UNEs and UNE combinations have not been generally available to provide purely special access services. At least in part for this reason, facilities-based competition for special access services is vibrant and growing. Utilizing over 600 local networks of their own, competitive local

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*" and "*Fourth FNPRM*").

² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*").

³ *Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, CC Docket No. 96-98, *Public Notice*, DA 01-169 (rel. Jan. 24, 2001) ("*Public Notice*").

exchange carriers (“CLECs”) deliver over one-third of the country’s special access services.

In a nutshell, UNE regulation of special access services makes no sense because the larger businesses and carriers that purchase those services already do so in a competitive market. As detailed in the *Special Access Fact Report*,⁴ CLECs have built multiple metropolitan fiber rings in cities throughout the country to provide special access services. CLECs built these facilities over the last seventeen years, beginning long before the Telecommunications Act of 1996 (the “Act”). Over that time, CLECs have developed operational support systems (“OSS”) for ordering, provisioning and maintaining their facilities, and have developed the contractual arrangements and courses of dealing to become full alternatives to incumbent local exchange carriers (“ILECs”). That these CLEC alternatives are genuinely “practical, economic and operational” alternatives is beyond debate as demonstrated by their 36% share of special access services.

Exporting to special access the Commission’s broad UNE policies designed to create competition for local exchange services would undo many years of Commission effort that created a pro-competitive special access regulatory environment. That regulatory environment, which did not allow for UNEs, contributed to creating the vibrant facilities-based special access competition that exists today. The policy basis for creating UNEs as an entry path into the local exchange market do not apply to already competitive special access services. Further, allowing carriers to substitute UNEs for

⁴ *Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport*, Attachment to USTA’s Comments, filed in this same proceeding on this same date (“*Special Access Fact Report*”).

special access services would undermine the Commission's local competition goals and state support mechanisms for universal service.

On the legal side of the equation, UNE regulation can be extended under section 251(d)(2) if, and only if, CLECs delivering special access services would be impaired without UNEs. The marketplace fact that CLEC networks have grown to the point where they provide over one-third of special access services means that the "marketplace evidence" that the Commission looks to as "most persuasive" is clear. CLECs have proven that they are not impaired in delivering special access services without ILEC UNEs.

The primary push for access UNEs has come from the largest interexchange carriers ("IXCs"). Their motivation is a potential wealth transfer through regulatory fiat of gargantuan proportion. If access UNEs and combinations were available to substitute for special access circuits, these carriers believe that they could transform the installed base of special access circuits that they have ordered over the years into UNEs. This circuit name change could reduce IXC payments for special access services by roughly 50 percent. No substantive aspect of the service would change, and no positive effect on local competition would result. The Commission is under no legal or policy compulsion to provide IXCs this pure windfall.

Based on market facts, the Commission should find that UNEs should not be available for the special access types of services that larger businesses and carriers purchase. The best approach to assuring this outcome would be to remove the high capacity UNE loops and dedicated transport that can be used to provision these services from the Commission's UNE list. (Simultaneously with the filing of these comments,

BellSouth has filed a Joint Petition with SBC and Verizon requesting the Commission to no longer treat high capacity loops and dedicated transport network facilities as UNEs.) A second approach, less preferable because it requires significant regulatory oversight, would be to impose customer or service-based eligibility requirements on UNEs and UNE combinations.

In this proceeding, the Commission should make its legal and policy decisions based on the “market evidence” that it has stated is the “most persuasive” in assessing UNEs. The *Special Access Fact Report* puts market facts on the table, including lists of CLEC metropolitan fiber networks, collocation activity and industry revenues. The Commission should require any parties seeking to demonstrate impairment to supply market facts of their own, not unsupported assertions and general policy arguments. An objective inquiry into market facts will demonstrate that CLEC facilities provide real alternatives to ILEC facilities across the country, and that as a consequence there is no legal or policy basis for UNEs in the special access arena.

II. HISTORY AND SCOPE OF THIS PROCEEDING

The *Public Notice* requests comments on the “legal and policy ramifications” of allowing carriers to substitute UNEs for ILEC tariffed access services.⁵ The Commission issued this broad call for comments in accord with the schedule set out in the *Supplemental Order Clarification* for developing a full record on UNEs and special access. That schedule allowed time for markets to adjust to the new unbundling rules issued in the *UNE Remand Order*.

⁵ *Public Notice* at 1.

In the interim, the Commission determined to maintain the status quo under which UNEs could not be substituted for special access services.⁶ To accomplish this, the Commission placed restrictions on UNE combinations and UNEs. First, the Commission prohibited carriers from substituting UNE combinations for special access service arrangements. The Commission required carriers to certify that they provided a significant amount of local exchange service to a customer before they qualified for UNE combinations to serve that customer. Second, the Commission prohibited connecting individual UNEs to special access services.⁷ These particular restrictions were viewed as adequate to preserve special access markets from UNE regulation without burdening local competition.

The *Supplemental Order Clarification* identified four specific areas for subsequent comment and analysis. First, whether allowing UNEs to be substituted for special access services “could cause substantial market dislocations and [] threaten an important source of funding for universal service.”⁸ Second, the *Supplemental Order Clarification* pointed out that the Commission had never considered whether carriers

⁶ As explained below, the Commission has consistently refused to find that UNEs would be available for purely access services. In addition, UNE combinations have not been available for access services since the 1997 8th Circuit decision in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997). That decision held that the Commission’s requirement that ILECs provide combinations of network elements ran afoul of section 251(c)(3). Subsequently, the Supreme Court reversed the 8th Circuit’s holding on the combination issue, but separately held that the Commission had misapplied the Act’s unbundling standard. The Court vacated the Commission rules identifying UNEs. As a result, no legal requirement for UNEs was in force until the Commission’s *UNE Remand Order* took effect in 2000. The *UNE Remand Order* established restrictions on UNE combinations, *UNE Remand Order*, 15 FCC Rcd at 3913, ¶ 489, which were broadened in the *Supplemental Order* and the *Supplemental Order Clarification*.

⁷ *Supplemental Order Clarification*, 15 FCC Rcd at 9602, ¶ 28. The Commission’s requirement that restricted the dedicated transport UNE to carriers providing local service to end user customers remained in force.

⁸ *Id.* at 9592, ¶ 7.

were impaired in their ability to offer access services without UNEs.⁹ Until that finding is properly made, there is no legal basis for carriers to have access to UNEs for delivering special access services.¹⁰ The *Supplemental Order Clarification* called for comment on this issue, including whether the access and local exchange service markets are so “inextricably interrelated” that a finding of impairment for local exchange services would suffice for access services. Third, the *Supplemental Order Clarification* recognized the need to analyze the marketplace effects of the new unbundling rules issued in the *UNE Remand Order*. The Commission expected those rules to “significantly increase competition in local markets by removing long-standing uncertainty about the scope of ILECs’ unbundling obligations and by stimulating new investment.”¹¹ Fourth, the Commission identified the need for a fuller record on the “potentially severe” consequences for facilities-based CLECs of allowing a flashcut to UNEs for special access services.¹²

As a matter of history, the Commission has not allowed individual UNEs or UNE combinations to become substitutes for access services. Thus, the Commission has consistently required that carriers provide local exchange service to a customer before they may deliver access services over individual UNE loops, switches and transport. As for UNE loops, in the *Local Competition Order*, the Commission explained that it expected carriers to use unbundled loops to provide both local exchange and exchange

⁹ *Id.* at 9594, ¶ 12.

¹⁰ *Id.* at 9594-9596, ¶¶ 12-16.

¹¹ *Id.* at 9596, ¶ 17.

¹² *Id.* at 9597, ¶ 18.

access services, not simply for access bypass.¹³ To do otherwise would threaten the growth of facilities-based competition because “new entrants will need the revenue streams from both [local exchange and exchange access] services to support the high cost of constructing competing local exchange facilities.”¹⁴

The Commission reached a similar conclusion for the local switching element. In its *Reconsideration Order*, the Commission held that a “requesting carrier that purchases an unbundled local switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service.”¹⁵

As for dedicated and shared transport UNEs, the Commission held that a carrier may use those individual UNEs only to provide “access services to customers to whom it provides local exchange service.”¹⁶ This holding meant that carriers could not use

¹³ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, *First Report and Order*, 11 FCC Rcd 15499, at 15679, ¶¶ 356-57 (1996) (“*Local Competition Order*”), *aff’d in part and vacated in part sub nom., Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part and remanded, AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

¹⁴ *Local Competition Order*, 11 FCC Rcd at 15672-73, ¶ 346.

¹⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, *Order on Reconsideration*, 11 FCC Rcd 13042, at 13049, ¶ 13 (1996) (emphasis added) (“*Reconsideration Order*”).

¹⁶ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12460, at 12483, ¶ 38 (1997) (“*Shared Transport Order*”). In that proceeding, the Commission sought further “comment on whether requesting carriers may use dedicated transport facilities to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service.” That issue is still pending. *Supplemental Order Clarification*, 15 FCC Rcd at 9588, ¶ 3.

dedicated transport UNEs, which are typically used to provide special access services, to provide solely special access services.

For local competition policy reasons, the Commission has consistently rejected arguments that UNEs should be available to substitute for access services.

III. CLECS PROVIDE OVER 1/3 OF SPECIAL ACCESS SERVICES USING OVER SIX HUNDRED LOCAL CLEC NETWORKS

CLEC local networks are providing real, everyday alternatives to ILEC facilities.

A. CLECs Provide a Large Share of Special Access Services

Using these networks, CLECs have taken 36 percent of the country's special access business, up from 33 percent in 1999.¹⁷ That 36 percent represents \$7.3 billion dollars in CLEC revenue from special access type services and 10 percent year-over-year market share growth. CLECs have a greater share of special access services than WorldCom and Sprint combined have of the long-distance market.¹⁸ The simple fact that CLECs provide over \$7 billion dollars worth of special access services annually shows that CLECs and their customers have the OSS for ordering, provisioning, maintaining and billing service and the business and contractual arrangements to provide real commercial alternatives. AT&T has noted that "CLECs for many years have had internal processes in place for analyzing and ordering special access."¹⁹

The number of CLECs providing special access has also increased dramatically – growing from 109 to 349 over the last year, according to reports filed with the

¹⁷ *Special Access Fact Report* at 5-6 and Table 3. The *Special Access Fact Report* relies on a CLEC report published by the independent New Paradigm Resources Group. ALTS relies on the same report for statistics about CLECs. See *The State of Local Competition, 2001*, published February 2001.

¹⁸ *Statistics of the Long Distance Telecommunications Industry*, issued by the Industry Analysis Division, FCC, dated January 2001, at Table 8.

¹⁹ *AT&T Reply Comments*, filed June 10, 1999, at 125, n. 256.

Commission.²⁰ The number of CLEC fiber miles increased by 35 percent from 1999 to 2000. CLECs now lay claim to 218,445 miles of fiber.²¹ CLECs and other providers of local transport services continue to build and expand their local networks, as described below.

B. Local Alternative Facilities For Special Access Services

CLECs now operate over 600 local networks. Large and small markets have multiple competing local CLEC networks. There are 27 markets with 7 or more competing CLEC networks. Smaller markets often have 2 or more CLEC networks.²² CLECs have long focused their competitive energies on constructing facilities to provide service to the more lucrative business market.²³ The following section discusses the development of facilities-based CLEC competition to provide larger businesses and carriers with special access services.

Competitive access providers began marketing facilities-based bypass of the ILEC network in 1984, when Teleport began constructing a fiber-optic network in Manhattan. In 1986, the Commission formally preempted “any *de facto* or *de jure* barrier to entry” into the provision of interstate exchange access services.²⁴ In 1992, the Commission recognized the already extensive build out of alternative local fiber networks, finding that DS1 and DS3 special access services were subject to

²⁰ *Special Access Fact Report* at 5.

²¹ *Id.* at 6, Table 3.

²² *Id.* at 11.

²³ *UNE Remand Order*, 15 FCC Rcd at 3700-3701, ¶¶ 5-6 (contrasting alternative switch and fiber deployment between larger business and mass market).

²⁴ *Cox Cable Communications, Inc.*, Memorandum Opinion, 102 FCC 2d 110 (1985), *vacated as moot*, 61 Rad. Reg. 967 (1986).

competition.²⁵ The Commission recognized that this competitive pressure was growing rapidly.²⁶

As the Commission predicted, the construction of *local* fiber networks has exploded, creating competitive alternatives to ILEC special access facilities in a broad array of urban markets. One well-known telecommunications analyst points to “an avalanche of metro capacity being deployed.”²⁷ Last year, over 200 new CLECs reported to the Commission that they were providing special access services. CLECs added 50,000 miles of fiber to their networks last year. This construction boom means that since 1999, the number of CLEC local networks in the 150 largest MSAs has grown from 486 to 635. That is, CLECs have built 149 new local networks in that time. The top 150 MSAs now contain 635 CLEC fiber networks. The top 100 MSAs have an average of over 3 CLEC networks per MSA.²⁸

²⁵ See, *In the Matter of Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs*, CC Docket Nos. 91-141 and 92-222, *Report and Order and Notice of Proposed Rulemaking*, 7 FCC Rcd 7369, 7451-55 (1992) (“*Special Access Order*”); *In the Matter of Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141 (Transport Phase I), *Second Report and Order and Third Notice of Proposed Rulemaking*, 8 FCC Rcd 7374, 7423-25 (1993) (“*Switched Transport Order*”).

²⁶ See *Special Access Order* 7 FCC Rcd at 7451-7453 (recognizing that in 1992 “competition is already developing relatively rapidly in the urban markets and will only accelerate with the implementation of expanded interconnection”); *Switched Transport Order* 8 FCC Rcd at 7423.

²⁷ J. Grubman, Salomon Smith Barney, *Grubman’s State of the Union* at 15 (Mar. 21, 2001). Another analyst has noted that “[w]e believe that we have reached the beginning of the end of the metropolitan bandwidth bottleneck . . . We are seeing a new generation of metropolitan bandwidth operators that will provide 100 Mbps plus connectivity at low cost to end users.” *Robertson Stephens Provides Outlook on Telecom Services*, PR Newswire (Sept. 7, 2000).

²⁸ *Special Access Fact Report* at 11-13. Compare P. Huber and E. Leo, *UNE Fact Report*, Prepared for Ameritech, Bell Atlantic, BellSouth, GTE, SBC, and US West, attached to the Comments of the United States Telephone Association, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, filed May 26, 1999. No party has taken issue with the accuracy of the *UNE Fact Report’s* city-by-city listing of alternative transport facilities.

CLEC local fiber networks cannot be conveniently dissected into loop and transport pieces as ILEC networks can be. CLECs provide “loops and transport” over a fiber ring with spurs into office buildings, wire centers or collocation hotels. This architecture allows CLECs to reach customers directly, bypassing the ILEC network completely, or to connect to customers through collocating at ILEC wire centers.

The fact that CLEC networks provide “loops” to larger businesses is clear from the market facts – CLECs reap over \$7 billion in special access revenues and account for 36 percent of special access services. A conservative estimate places direct CLEC connections into 25 percent of the office buildings in the United States.²⁹ Once the CLEC ring network has been constructed, adding fiber spurs into buildings is typically done as customers are won. CLECs can take advantage of ILEC poles, ducts and conduits and ILEC wire within buildings, all at TELRIC prices, to extend their networks. Several CLECs also use wireless connections to establish high capacity connections quickly and cheaply from new business customers to the CLEC’s existing fiber network.³⁰

Representative maps depicting the extent of CLEC metropolitan area fiber networks are attached to these comments and to BellSouth’s 1999 Comments.³¹ These

²⁹ *Special Access Fact Report* at 11.

³⁰ *Special Access Fact Report* at 13-14.

³¹ See maps attached hereto and maps attached as Attachment B to BellSouth Comments, filed May 26, 1999, in this same proceeding. BellSouth’s maps are based on BellSouth independent data collection efforts from 1998 and 1999. The maps illustrate alternative provider fiber networks in 12 cities in BellSouth’s region. While incomplete due to lack of information from CLECs, these maps provide additional information on CLEC network build outs in BellSouth’s region. The maps do *not* include the often ubiquitous fiber facilities of cable providers and utility companies. The fact that the Commission has not systematically collected CLEC information handicaps the ability to peg the scope of CLEC alternative facilities. See, *1998 Local Competition Survey* at 3 (“the Commission, however, gathers almost no systematic information from new

maps highlight the breadth and depth of CLEC fiber networks. These networks run through downtown central business districts and suburban office parks. The networks extend throughout the metro areas connecting high-volume business customers and carrier locations.

Although some IXC carriers argue that CLEC networks are limited to entrance facilities connecting IXC POPs and ILEC serving wire centers,³² this is clearly wrong, as a quick look at the maps illustrates. Alternative providers have not artificially constrained their networks as this argument would have it. Rather, their business plans have always focused on providing links to POPs, central offices and the maximum number of large businesses within an area – providing connections between “large concentrations of high volume customers” in the Commission’s words. Thus, NextLink “design[s] each network to connect the maximal number of businesses, long distance carriers’ points of presence and ILEC principal central offices in the area to be served.”³³ GST Telecommunications “designs its networks with a ring architecture with connectivity to the ILEC’s central offices, POPs of long distance carriers and large

entrants”); *Pricing Flexibility Order*, 14 FCC Rcd at 14276 ¶ 96 (Commission effort to assess competition “hampered by the lack of verifiable data concerning competitors’ revenues and facilities. Unlike ILECs, competitors are not subject to Commission reporting requirements, and they are often unwilling to provide this information voluntarily”).

³² *MCI WorldComm UNE Remand Comments*, filed May 26, 1999 at 64. ALTS correctly points out that alternative providers focused on constructing fiber facilities to “connect IXCs and their large business customers.” Daniel Kelly, “Deregulation of Special Access Services: Timing is Everything,” ALTS White Paper, CC Docket No. 96-262, filed June 25, 1999, at 7-8 (“ALTS White Paper”). Before 1992, when the Commission required ILECs to provide collocation in their wire centers, alternative providers focused on constructing and operating the direct links between end users and POPs that MCI WorldCom claims are missing. *Special Access Order*, 7 FCC Rcd 7369.

³³ NextLink Communications, Inc., Form 10-K, dated March 29, 1999, at 11.

concentrations of telecommunications intensive end-users.”³⁴ Similarly, when ICG builds local fiber facilities it “designs a ring architecture with a view toward making the network accessible to the largest concentration of telecommunications-intensive businesses in a given market.”³⁵

CLECs have particular flexibility to substitute alternative provider local networks for ILEC facilities by establishing POPs on fiber alternatives. For example, Time Warner Telecom “provides dedicated transport between local exchange carrier central offices and customer designated POPs of an IXC” as well as lines “linking the Points of Presence of one IXC or the POPs of different IXCs in a market, allowing the POPs to exchange transmissions for transport.”³⁶ Similarly, e.spire’s facilities provide “alternative local access to long distance carrier networks.”³⁷ IXCs also have considerable flexibility to locate and link their POPs, thereby creating extensive additional network alternatives over their own facilities.³⁸

In the past few years, wholesale providers of local fiber transport have created yet another alternative to ILEC high capacity loops and transport facilities. These neutral third-parties sell local connectivity to CLECs, IXCs and others. Providers like MFN (local networks in 17 larger cities) and American Fiber Systems (local networks in 56

³⁴ GST Telecommunications, Inc., Form 10-K, dated March 12, 1999, at 2.

³⁵ ICG Communications, Inc., Form 10-K, dated March 31, 1998, at 10.

³⁶ Time Warner Telecom LLC, Form 10-K, dated March 31, 1999 at 6.

³⁷ E.spire Special Access Service Marketing Information at 1, available at <http://www2.espire.net/products/voice/special_access.cfm>.

³⁸ IXCs have acted to more than fulfill this potential by, among other things, deploying substantial numbers of POPs. For example, the Big Three IXCs collectively have established 244 POPs in Atlanta, 302 in S.E. Florida, 57 in Charlotte, NC and 38 in Birmingham, AL. IXCs can provide transport among POPs over their own networks or obtain it through alternative provider services linking POPs, like the POP-to-POP service provided by Time Warner Telecom described immediately above.

smaller cities) have built metro fiber networks and fiber links to "... carriers, ISPs, POPs, IXC's, collocation hotels, web hosting facilities, ILEC central offices and major commercial buildings" ³⁹ These neutral wholesalers have networks in dozens of cities and are rapidly expanding. ⁴⁰ Local fiber connections are also available from several long distance carriers including Qwest, Global Crossing and Williams. ⁴¹

BellSouth has also submitted data on the presence of alternative transport facilities and collocation in BellSouth's wire centers in its *Pricing Flexibility Petition*. ⁴² These data show that alternative transport facilities are present in the BellSouth urban wire centers, often in large numbers, where special access demand is highly concentrated. ⁴³ For example, three cities in BellSouth's region have wire centers with over twelve fiber-based collocators.

Measuring the breadth of CLEC special access competition using the Commission's "market-based" *Pricing Flexibility Order* framework provides a further demonstration that CLECs' fiber networks provide a broad set of alternatives to ILEC

³⁹ Looking Glass Networks, *Corporate Data*, www.lglass.com/corpdata.htm.

⁴⁰ *Special Access Fact Report* at 14-21 and Table 6.

⁴¹ *Special Access Fact Report* at 21-23 and Table 7.

⁴² *In the Matter of BellSouth Telecommunications, Inc.'s Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 00-20, *Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, filed August 24, 2000.

⁴³ Competitive transport facilities present in BellSouth's wire centers generally consist of multiple fiber sheaths, each containing 24 strands of fiber. The multiple sheaths indicate that the typical competing provider is using a ring architecture providing at least some route diversity. The number of strands indicates that the fiber facility has the capability to carry very large amounts of traffic.

services.⁴⁴ The Commission's framework measures the breadth of CLEC special access services by examining the percentage of ILEC special access revenues in an MSA that come from ILEC wire centers where CLECs with fiber facilities are collocated. The Commission and the D.C. Circuit acknowledge that this approach is highly conservative because it does not account for CLECs that have completely bypassed ILEC wire centers.⁴⁵ Many CLECs have established collocation in independent "collocations hotels."⁴⁶ Collocating in these independent facilities allows "most new business telecom providers ... to bypass the traditional infrastructure."⁴⁷

The Commission's framework shows that CLEC alternatives to ILEC high capacity facilities are broadly available throughout the country. 183 MSAs have CLEC fiber in ILEC offices covering 30 percent or more of the ILEC special access revenue earned in the MSA. CLEC fiber covers offices accounting for 65 percent or more of ILEC special access revenues in 154 MSAs. 37 MSAs in BellSouth's region meet the 30 percent test. The degree of special access competition in BellSouth's region is illustrated by the fact that those 37 MSAs also qualify under the 65 percent threshold.

The costs to construct fiber networks and to build spurs off existing CLEC networks to add connection to buildings or other locations continues to drop.⁴⁸ Because multiple CLEC fiber networks exist in hundreds of MSAs throughout the country, the most relevant question is the cost of adding connections to these networks, rather than the

⁴⁴ The Commission's approach was recently upheld in *WorldCom v. FCC*, 238 F.3d. 449 (D.C. Cir. 2001).

⁴⁵ *WorldCom v. FCC*, 238 F.3d at 458-459.

⁴⁶ *Special Access Fact Report* at 8.

⁴⁷ V. McCarthy, *Local Carriers Take Over Office Buildings*, Interactive Week (May 22, 2000), <http://www.zdnet.com/intweek/stories/news/0,4164,2574580,00.html>.

⁴⁸ *Special Access Fact Report* at 13.

cost of constructing an entire new network. The cost of adding short spurs to serve new customers or additional wire centers is limited. “Once a competitor has infrastructure in place, the marginal cost of adding customers is not significant.”⁴⁹

IV. THE SPECIAL ACCESS ENVIRONMENT IS RADICALLY DIFFERENT FROM THE LOCAL EXCHANGE ENVIRONMENT

The *Public Notice* asks whether the exchange access and local exchange markets are closely interrelated from an economic and technological perspective.⁵⁰ As the *Special Access Fact Report* shows, the short answer is no. Special access services differ radically from switched local exchange services from both demand and supply perspectives. The basic economics of providing dedicated special access connections between carriers and densely concentrated large businesses have been long recognized to be very different from those of providing mass market telephone exchange service. There is also a long record of different regulatory treatment of the two sets of services: access competition began well over a decade before the Act was passed. Access competition has matured under a set of Commission rules that resulted in vibrant facilities-based competition without UNEs.

A. Special Access Services Defined

“Special access services” as used herein includes a number of separate services sharing common characteristics. “Special access services do not use local switches; instead they employ dedicated facilities that run directly between the end user and the

⁴⁹ *WorldCom v. FCC*, (D.C. Circuit, Jan 2001), Brief of FCC, Respondent, at 36 (July 20, 2000).

⁵⁰ *Public Notice* at 1.

IXC's point of presence (POP))."⁵¹ The connection may run on ILEC facilities from the end-user all the way to the POP. However, in many cases, the connection terminates at an intermediate place between the end user and the POP, often in a CLEC collocation space. In this case, an alternative network provides transport to the POP.

Other dedicated transport services and facilities share common characteristics with special access. The Commission has grouped these other services under the "dedicated transport services" label. This group consists of "entrance facilities, direct-trunked transport, and the dedicated component of tandem-switched transport."⁵² Like special access, the services and facilities in the dedicated transport group establish dedicated connections between high-volume users and are subject to the same competitive pressures. The Commission has treated special access and these dedicated transport services as a common set.⁵³ Private line services share the same essential characteristic of establishing dedicated connections between high-volume end-users.

Thus, as used herein, "special access" refers to the family of services and associated facilities used to provision dedicated connections between and among carriers and high-volume end-user customers, including traditional special access, dedicated transport and private line services.

⁵¹ *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Carriers; Petition of U S WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, 98-157 and CCB/CPD No. 98-63, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, at 14226, ¶ 8 (1999) ("Pricing Flexibility Order").

⁵² *Pricing Flexibility Order*, 14 FCC Rcd at 14234, ¶ 24 n.54.

⁵³ *Id.* at 14234, ¶ 24.

B. Special Access Services Are Distinct From Local Exchange Services

Special access purchasers and facilities are distinct from switched local exchange purchasers and facilities in a number of ways. The two groups of services are anything but “inextricably interrelated.”

One important distinction is in the customer groups. “The vast majority of purchasers of interstate access services are telecommunications carriers, not end users.”⁵⁴ Over seventy percent of BellSouth’s special access revenues come from IXCs.⁵⁵ Almost ninety percent comes from carriers. The remaining purchasers of special access services, and the end users of IXC and other carrier services, are businesses that are intensive users of telecommunications services. Residential and small business customers do not buy these services. This distinction is generally recognized, and has long been accepted by the Commission and carriers.⁵⁶ Larger business users have long been treated by the Commission as economically distinct from mass market customers.⁵⁷

⁵⁴ *Local Competition Order*, 11 FCC Rcd at 15934, ¶ 873.

⁵⁵ *Special Access Fact Report* at 3 and Table 2 (reporting similar percentages for Qwest, SBC and Verizon).

⁵⁶ *Pricing Flexibility Order*, 14 FCC Rcd at 14296-14297, ¶ 142; *see also WorldCom v. FCC*, No. 99-1395 (DC Cir. 2001) (“Most users of special access are companies with high call volumes.”); Corrected Brief for Federal Communications Commission at 4, *WorldCom v. FCC*, No. 99-1395 (DC Cir. filed Sept. 12, 2000) (“Because special access services employ dedicated facilities, special access is typically used by IXCs and large businesses with high traffic volumes.”); Brief of MCI WorldCom, Petitioners and Supporting Intervenors, *WorldCom v. FCC*, No. 99-1395 (D.C. Cir. filed Sept. 8, 2000) (“Special access, used generally by business customers who have a high volume of calls, is accomplished ‘via a private, dedicated line...running from the customer to the IXC’...By contrast, switched access connections are generally used by residential customers and other customers with lower traffic volumes.”).

⁵⁷ *See, e.g., In the Application of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, *Memorandum Opinion and Order*, 12 FCC Rcd 19985, at 20016, ¶ 53 (1997)

The distinction between the purchasers of these services holds true at the technological and facility level as well. BellSouth's special access revenues come overwhelmingly from the provision of high capacity (DS1 and above) circuits that the Commission has recognized are "primarily used by business customers."⁵⁸ Residential and small business customers use basic 2-wire analog loops, not high capacity facilities like DS1s, for basic local exchange service. And, unlike basic local exchange facilities, these high capacity special access links are provisioned over "dedicated facilities that run directly between the end user and the IXC's point of presence (POP), or between a LEC's switch and an IXC's POP."⁵⁹ In contrast, ordinary local exchange services "use local exchange switches to route originating and terminating interstate toll calls" over common transport facilities.⁶⁰

A further important distinction between basic telephone exchange and special access services is in customer location and concentration. Special access users are highly concentrated in downtown business districts and suburban office parks. The Commission recognized that basic economics favored special access competition because "[t]raffic density is greater, and costs lower, in most central city areas where large concentrations

⁵⁸ See, e.g., *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Second Report*, 15 FCC Rcd 20913, at 20955, ¶ 99 (2000). SBC, Verizon and Qwest report similar percentages of special access revenue coming from high capacity circuits. *Special Access Fact Report* at 2, Table 1.

⁵⁹ *In the Matter of Access Charge Reform, Price Cap Performance for Local Exchange Carriers, Low-Volume Long-Distance Users, and Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, *Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, and Eleventh Report and Order in CC Docket No. 96-45*, 15 FCC Rcd 12962, 13015, ¶ 130 (2000) ("CALLs Report and Order").

⁶⁰ *Id.*

of high volume customers are located...⁶¹ The high concentration of BellSouth's special access revenues reflects this basic fact. Over sixty percent of BellSouth's special access revenue is contained in only six percent of BellSouth's wire centers. Over ninety percent is contained in twenty percent of BellSouth's wire centers.⁶² Revenues from switched local exchange service tend to be spread across a broader geographic area.

Customer relationships also distinguish these services from basic local exchange services. IXC's maintain the lion's share of direct relationships with end user customers. "Access services," the Commission has noted, "are designed for, and sold to, IXC's as an input component to the IXC's' own retail service."⁶³ The IXC's maintain the direct relationship with customers in these circumstances. In the special access world, it is the alternative providers that have the established customer base, not the ILECs.

V. MARKET REALITIES DEMONSTRATE THAT THERE IS NO LEGAL OR POLICY BASIS FOR UNBUNDLING SPECIAL ACCESS NETWORK ELEMENTS

The high capacity DS1 and above loop and transport network elements used to provide special access services (including dedicated switched transport and private line services) do not meet the unbundling standard set out in section 251(d)(2). Section 251(d)(2) requires that impairment be measured against "the services the carrier seeks to offer." An impairment finding in the local exchange market cannot support a similar conclusion for special access services because the two markets are not "inextricably interrelated."

⁶¹ *Special Access Order*, 7 FCC Rcd at 7452, ¶ 175.

⁶² *Special Access Fact Report* at 3. SBC and Verizon report that roughly 80 percent of their special access revenues come from 20% of their wire centers.

⁶³ *Local Competition Order* at 15935, ¶ 874.

Applying the factors set out in the *UNE Remand Order* to the market realities reveals that alternative carriers have been and continue to be unimpaired in their ability to offer special access services without UNEs. The fact that CLECs operate hundreds of local networks across the country and use those networks to supply over one-third of the special access revenues using their own facilities should end any debate on impairment. Further, special access service providers have long passed the stage where UNEs could have filled the pro-competitive role the Commission has assigned them in the local exchange market.

A. The Commission's Rationale For The Pro-Competitive Role Of UNEs For Local Exchange Service Does Not Fit Special Access Services

The Commission has identified two pro-competitive roles for UNEs. First, UNEs could provide a means for “fledgling” carriers to win customers without the delay or risk involved in bringing their own facilities on-line. Second, UNEs could allow these “fledgling” carriers to fill in gaps in their networks.⁶⁴

Just as the provision of alternative access arrangements is not a business of “fledgling” competitors, the bases for the Commission’s UNE policies are absent here. Access competitors have been in business since 1984. Today they operate over 600 networks in the top 150 MSAs and have won 36 percent of the market. These competitors do not need UNEs to develop a customer base because they already have a large base using their own facilities, and generally own the customer relationship in the additional cases where they use ILEC facilities as an input to their own services.⁶⁵

⁶⁴ *UNE Remand Order*, 15 FCC Rcd at 3700, ¶ 6.

⁶⁵ *Local Competition Order*, 11 FCC Rcd at 15934, ¶ 873 (“[t]he vast majority of purchasers of [ILEC] interstate access services are telecommunications carriers, not end users”).

Similarly, UNEs are not needed to allow alternative providers to fill in network gaps as they begin construction of “fledgling” alternative networks. Construction of alternative networks has been on-going for over fifteen years. CLECs operate over 600 local networks, with multiple CLEC networks in 136 MSAs. Where the market shows that alternative providers have already sunk investment into fiber facilities that broadly cover the special access users in an MSA, UNEs are not needed to fill in gaps so service can be offered. Any additional extensions (e.g. connections to a particular customer) can be and are typically added as customers in new locations are won. Networks can be timely extended over CLEC rights-of-way, ILEC rights-of-way at TELRIC prices, by using the facilities of transport wholesalers or using wireless connections.

B. Carriers Seeking To Offer Special Access Services Are Not Impaired Without ILEC UNEs

The Commission has long recognized that there are alternatives to ILEC special access services.⁶⁶ Using their own networks, CLECs have taken 36% of the special access business. Broad alternatives to ILEC special access services exist throughout a broad range of MSAs. Facilities-based special access competition arrived without UNEs, and special access competitors long ago moved well past the possibility of impairment or a need for UNEs. In 1998 ALTS was already of the opinion that “[t]here are not significant issues for new entrants relative to dedicated services.”⁶⁷

⁶⁶ The Commission’s 1992 *Special Access Order*, for one example, recognized that “competition is already developing relatively rapidly in the urban markets and will only accelerate with the implementation of expanded collocation.” *Special Access Order*, 7 FCC Rcd at 7423.

⁶⁷ ALTS Comments, *In the Matter of Local Competition Survey*, CC Docket No. 91-141, filed June 8, 1998, at 9 (emphasis added).